United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 28, 2006

TO : Rik Lineback, Regional Director
Region 25

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sunbelt Rentals, Inc. 530-6067-6001-3740
Case 25-CA-29798 530-6067-6001-3750
530-6067-6001-3790
530-6067-6067-3900

This case was submitted for advice as to (1) whether the Employer violated Section 8(a)(5) of the Act by refusing to provide the Union with certain information regarding employees at a newly-acquired facility, and if so, (2) whether the Region should issue complaint but argue that the charge should be deferred to the parties' arbitration proceeding.

We conclude that the Union has failed to demonstrate the relevance of the requested information, and therefore the charge should be dismissed, absent withdrawal.[1]

Facts

Sunbelt Rentals, Inc. (the Employer) maintains and rents construction equipment. It operates a facility in Indianapolis, Indiana. Operating Engineers Local 103 (the Union) represents a unit of approximately 20 of the Employer's mechanics, truck drivers, and yard workers at the Indianapolis facility.

The parties' current collective-bargaining agreement contains a grievance-arbitration mechanism (including mediation and binding arbitration) to resolve disputes arising under the contract. The contract also contains the following provision regarding extension of the contract to new or newly-acquired facilities:

> ARTICLE 1 – UNIT ACCRETIONS
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> The Employer shall, to the extent permitted by law, extend this Agreement (for employees performing the same type of work) to any

[1] In light of this conclusion, there is no basis for arguing that the charge be deferred to the parties' arbitration proceeding.

> additional shop(s) which may be established within the territorial jurisdiction covered by the Union as of March 1, 2002.
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> Notwithstanding above mentioned, the classifications and base hourly wage rates, along with other terms and conditions of employment of the new shop, shall be subject to negotiations and joint agreement of the parties for any additional shop locations within the territorial jurisdiction of the Union.

On September 19, 2005,[2] the Employer acquired another equipment rental facility, Lewis Brothers, Inc., located in Fishers, Indiana, about 30 miles from the Indianapolis facility. The Fishers facility is apparently within the Union's territorial jurisdiction.[3]

On September 28, the Union wrote to the Employer requesting certain information regarding employees at the newly-acquired Fishers facility. The Union noted that Article I of the parties' contract discusses unit accretion within the territorial jurisdiction of the Union, and stated that since the Lewis Brothers shop is within the Union's territorial jurisdiction, the Union needed additional information regarding the acquisition. Specifically, the Union requested:

1. A list of current employees at the Lewis facility, including their names, addresses and job classifications;
2. The wage rate of each employee;
3. A detailed description of the employees' current fringe benefits, including the amount of employee contributions to health insurance premiums and pension plans;
4. Summary plan descriptions for each of the health insurance programs and pension plans; and
5. All employee handbooks, work rules or other memoranda setting forth or describing working conditions at the Lewis shop.

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[2] All dates hereafter are in 2005 unless otherwise noted.

[3] The Region initially treated this question as undisputed, although subsequent evidence indicates that the Employer may dispute this fact. In any event, there is no evidence that effectively rebuts the Union's contention that the Fishers facility is within its territorial jurisdiction.

On October 4, the Employer responded that it would not produce the requested information.[4] It stated that the Employer "surmised" from the information request that the Union believes it is the collective-bargaining representative of the former Lewis Brothers employees, and that the Employer believes that the employees are *not* represented by the Union. The Employer noted that the "unit accretion" provision of the parties' collective-bargaining agreement provides for application of the contract "*to the extent permitted by law.*" It asserted that accretion of the former Lewis employees into the existing unit or recognition of the Union as the bargaining representative of those employees would not be permitted under the NLRA because they have not been integrated into the bargaining unit[5] and the facilities are geographically remote (27 miles apart).

On October 10, the Union filed a grievance stating:

> [The Union] disagrees with your interpretation of Article 1, Unit Accretions. In your response to the information request the Local submitted you state these facilities are geographically remote. Both are within the established jurisdiction of Local 103. The Local also believes the employees at both locations are performing the same type of work and therefore should be extended the agreement as Article 1 Unit Accretions states.[6]

On October 24 and November 15, the Union wrote letters to the Employer renewing its request for information necessary to "pursue and process" the pending grievance. The parties met once to discuss the grievance, at a March 3,

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[4] The Company asserts that it did provide the Union with the job classifications for Fishers employees, including drivers, mechanics, road mechanics, and yard laborers.

[5] Specifically, the Employer notes that the former Lewis employees continue to work at the Fishers facility under the same supervision they had while employed by Lewis Brothers, and there is no temporary or permanent interchange of employees between the Fishers and Indianapolis facilities.

[6] It is not entirely clear what the Union is pursuing in its grievance, i.e., whether the grievance concerns a refusal by the Employer to treat the former Lewis employees as an accretion to the existing unit and/or the Employer's failure to provide the requested information. The Union describes the grievance as "protesting the Company's refusal to supply [the Union] with information."

2006 meeting with a mediator. At that mediation session, the parties discussed both the request for information and the accretion issue. The Union claimed that it had a right to the requested information and argued that the former Lewis employees were an accretion under the contract. The Employer took the position that it had no obligation to provide the information, and that the two facilities were not "tied together" because of the distance between them, the different management, and the fact that the Fishers facility is not within the Union's jurisdiction. The mediation was unsuccessful. The Union has indicated that it will arbitrate the grievance if the Region does not issue a complaint.

After filing this charge, the Union asserted that it needs the information to contact the employees and talk to them about the Union, and to tell them that the Union considers them to be an accretion under the contract. The Union also informed the Region that, in addition to supporting its claim of accretion, it is seeking the requested information to determine if the employees at the Fishers facility desire Union representation, and to prevent the erosion of unit work.

Action

The Region should dismiss the charge, absent withdrawal, because the Union has failed to establish the relevancy of the requested information.

As part of its duty to bargain in good faith, an employer must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employees' statutory representative. This includes any information relevant and reasonably necessary for negotiating or administering and policing a collective-bargaining agreement,[7] including determining whether to file a grievance or proceed to arbitration, or deciding what position to take with respect to a pending grievance.[8] While information pertaining directly to employees within the bargaining unit is presumptively relevant, information not on its face directly related to unit employees must be produced only if the union can show its relevance to the collective-bargaining process.[9] The

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[7] NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967).

[8] Service Employees Local 144 (Jamaica Hospital), 297 NLRB 1001, 1002-03 (1990) (citations omitted).

[9] San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 867-868 (9th Cir. 1977), and cases cited.

Board applies a "liberal, discovery-type" standard to determine whether the requested information is probably or potentially relevant to the execution of the union's statutory duties.[10]

In this case, the requested information concerns the terms and conditions of employment of the employees at the Employer's newly-acquired Fishers facility. Thus the information at issue is not presumptively relevant, as it concerns employees who are not part of the existing unit, except possibly by application of the "unit accretion" clause of the parties' contract.

The Union argues that the requested information is relevant to a possible claim of accretion. During the investigation of the instant charge, the Union informed the Region that it was also seeking the information in order to determine if the employees at the Fishers facility desired union representation and to prevent the erosion of unit work. We conclude that the Union has failed to demonstrate the relevance of the requested information.

Possible accretion claim. The Union's request for the names, addresses, job classifications, wage rates, and benefit information of the former Lewis employees is generally not for the type of information that would help the Union evaluate whether those employees constitute an accretion under the NLRA.[11] The only possible exception to this is the request for the job classifications, which, as noted above, the Employer asserts it provided to the Union. As noted by the Employer, the Union did not otherwise seek information relevant to a determination of whether accretion is appropriate, such as information relating to the integration of operations, the degree of employee interchange, and the supervision of the employees arguably

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[10] Pfizer, Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985); NLRB v. Acme Industrial Co., 385 U.S. at 437.

[11] Compare Torrington Company, 223 NLRB 1233, 1240-1241 (1976), enfd. 545 F.2d 840 (2nd Cir. 1976), where the ALJ found certain information relating to transfers of operations, transfers of employees, community of interest, and relationship of production processes potentially relevant to establishing that there had been a merged or accreted unit.

constituting an accretion.[12] Accordingly, we conclude that the Union has not demonstrated that the information was potentially relevant for this purpose.

Determining majority support. Although the Union informed the Region that it requested the information to determine if the employees at the Fishers facility desire union representation, it does not appear that the Union actually sought the information for that purpose. It certainly never communicated such a reason to the Employer. The evidence indicates that the parties contemplated the absorption of employees of any newly-acquired facility into the existing unit as an accretion, which involves extension of recognition without a showing of majority support. In this regard, the parties' contractual provision is titled "unit accretion." And, in their written exchanges regarding the Union's information request, the parties treated the issue regarding this provision as one of accretion. For instance, the Union's initial request for information on Septemer 28 referred specifically to the unit accretion clause, and the Employer's October 4 response denying the information also included a denial that the new facility would constitute an accretion. Moreover, the Union asserts that it intended to use the information to contact the Fishers employees to talk with them about the Union and to tell them that it considers them to be an accretion to the contractual unit under the parties' contract (as opposed to determining whether they desire Union representation).

Even if the title of this "accretion" clause were a misnomer and the provision should be viewed as a typical "after-acquired" clause, which under Kroger[13] and its progeny requires proof of majority status prior to recognition, the Employer would not be obligated to provide information to assist the Union in determining the employees' representational desires and obtaining the necessary majority support. A Kroger clause would not be enforceable under Section 8(a)(5) unless and until the Union has demonstrated majority status among the former Lewis employees.[14] In this case, the Union has not shown

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[12] See generally Towne Ford Sales, 270 NLRB 311, 311-312 (1984), affd. sub nom. Machinist District Lodge 190 v. NLRB, 759 F.2d 1477 (9th Cir. 1985).

[13] Houston Div. of Kroger Co., 219 NLRB 388 (1975).

[14] Id. at 389 (although the agreement in Kroger lacked an explicit condition that a union must represent a majority of the employees in a new store, the Board assumed that the parties intended their agreement to be lawful, and therefore read into the recognition agreement a condition that the

representational support from anyone at the new facility, and until the Union demonstrates a majority, the Employer has no bargaining obligation regarding these employees. Accordingly, the Employer was under no obligation to provide the requested information for this asserted purpose.

Preventing erosion of unit work. The Union told the Region that it was also seeking the information in order to prevent the erosion of unit work. This reason also does not establish the relevancy of the requested information. No evidence indicates that bargaining unit work was to be transferred to the Lewis facility.[15] We also note that this concern was not mentioned in the Union's September 28 letter requesting the information or in its letters renewing that request.[16] In addition, this argument is problematic because it could raise the same concerns the D.C. Circuit had with the Board's decision in Pall Biomedical Products

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union must in fact obtain majority status at the new facility).

[15] See, e.g., Tri-State Generation, 332 NLRB 910 (2000) where the Board found premature a union's request for information about employees at a company that was likely to merge with the employer that the union claimed would constitute an accretion to the existing contractual unit. The Board rejected the union's alternative assertion, first raised after the ulp charge had been filed, that the requested information was relevant to preserving unit work, noting that the requested information had no bearing on how the unit's work jurisdiction would be affected by the merger, and there was no indication that existing bargaining unit work would be transferred to the other location. Id. at 911. Compare Pall Biomedical, 331 NLRB 1674, 1676 (2000), enf. den. 275 F.3d 116 (D.C. Cir. 2002), where the evidence showed that the clause was in response to and directed at concerns about the possibility of the transfer of unit work, and where the employer had in fact transferred equipment worked on by unit employees to the new facility and hired employees with titles and duties similar to those of unit employees.

[16] See, e.g., Pall Biomedical, 331 NLRB at 1679, n.10 (Board found that the employer was not obligated to honor the union's October 11 request for names and addresses of employees at new facility because the only reason the union offered for this request was its unlawful claim that it was the bargaining representative of those employees when it did not have proof of majority support).

Corp.[17] For all these reasons, we conclude that the requested information is not relevant to preventing a possible erosion of unit work.

Based on the above, we conclude that the Union has failed to demonstrate the relevance of the requested information. Accordingly, the Employer was not obligated to provide it, and the Region should dismiss this Section 8(a)(1) and (5) charge, absent withdrawal.

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[17] 275 F.3d at 121-122. In that case, the court held that unlike a provision to extend a collective-bargaining agreement to employees performing unit work in a new facility, which is a "direct frontal attack" upon the issue of work being transferred out of the unit, an agreement merely extending recognition to a new facility is, at most, a way of expediting recognition of the union. Id. at 122. It held that whether the union would eventually negotiate a collective-bargaining agreement that would equalize labor costs is too speculative to be considered a "direct frontal attack." Id.

In the instant case, the parties apparently contemplated that although the contract would be extended to cover these employees as part of the extant unit, the parties would also bargain about wages and some other terms and conditions of employment that would apply to them. Thus it could be argued that as the court decided in Pall Biomedical, it would be speculative to conclude that any agreement reached by the parties on wages and other terms and conditions of employment would equalize labor costs and thus would vitally affect unit interests.